IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 24 OF 2007

1. Skyline Aquatech Exports Ltd.,
No.80, 111 Cross Lavelle Road,
Bangalore, Karnataka, 560 001.

2. Mr. Peter J.R. Prabhu,
Manging Director,
Skyline Aquatech Exports Ltd.,
No.80, 111 Cross Lavelle Road,
Bangalore, Karnataka, 560 001.

3. Mrs. Carmel Prabhu,
Director,
Skyline Aquatech Exports Ltd.,
No.80, 111 Cross Lavelle Road,
Bangalore, Karnataka, 560 001.

4. Mr. S.R. Singh,
Director,
Skyline Aquatech Exports Ltd.,
No.80, 111 Cross Lavelle Road,
Bangalore, Karnataka, 560 001. .... Petitioners

V/s.

M/s. Sachima Agro Industries Pvt. Ltd.,
a Company incorporated under
the Indian Companies Act,
through its Managing Director,
Sara Fernandes,
having its registered office at 136,
Cotta, Chandor, Salcete, Goa. .... Respondent

Mr. S.D. Lotlikar, Senior Advocate with Mr. R. Menezes, Advocate for the Petitioners.
Mr. M.S. Joshi, Advocate for the Respondent.

Coram : N.A. BRITTO, J.

Date : 22nd OCTOBER, 2007

ORAL JUDGMENT :

Rule. By consent heard forthwith.

2. Challenge in this petition, filed under Section 482 of the Code of Criminal Procedure, 1973, is to the order dated 30/06/2007 of the learned Sessions Judge, Panaji upholding the order dated 3/11/1998 of the learned JMFC issuing process against the accused under Section 138 of the Negotiable Instruments Act, 1881 (Act, for short).

3. The Complainant and A1 are registered companies. A2 to A7 are the directors of A1.

4. This petition has been filed by accused nos. 1,2,5 & 6 in the said complaint filed by the Complainant.

5. The subject matter of the complaint are two cheques, both dated 29/12/1997 for a sum of Rs. 12,75,000/- and Rs. 10,00,000/- issued on behalf of accused no.1/company of which accused no.2 is the Manager Director. The said two cheques were initially signed by two Directors of the said company namely A3/D'Souza and A4/Kumar as company's authorized signatories. As per the Complainant the said two cheques dated 2/05/1997 were returned to A3/D'Souza who was the company's General Manager at

Goa and who returned the said two cheques after changing the date from 2/05/1997 to 29/12/1997 and the said two cheques thereafter were presented for payment but were returned dishonoured, the cheque for Rs. 12,75,000/- having been dishonoured on the ground that the signatories were withdrawn by the company and the cheque for Rs. 10,00,000/- on the ground that the payment was stopped by the drawer and the signatories were withdrawn. The Complainant sent notices dated 5/06/1998 for dishonour of each of the cheques and called upon the accused to make the payment within a period of 15 days and thereafter on the failure on the part of the accused to make the payment, the Complainant filed the complaint.

6. The learned Sessions Judge dismissed the revision petition filed by the petitioners. However, one thing which is clear today is that A3/D'Souza was discharged in a revision petition filed by him bearing no. 42/2000 by order dated 27/06/2001 and the said order as on today has attained finality. Mr. Joshi, the learned Advocate appearing on behalf of the Complainant, upon instructions from the Complainant, has also stated that A7/Dr. K.C. Nag has expired. It is therefore obvious that no inquiry/trial can now proceed against A3/D'Souza who stands discharged and A7/Dr. K.C. Nag who has expired.

7. A4/Selva Kumar has not challenged the order issuing process against him.

8. The first question to be addressed is whether the inquiry/trial could proceed against A5/Carmel Prabhu and A6/S.R. Singh, the latter having been nominated as the Director on behalf of Karnataka State Financial Corporation. The said accused has filed a copy of the letter dated 3/03/1994 sent by the Assistant General Manager (MIS) stating that the said A6/S.R. Singh is a nominated Director in terms of Section 27(2) of the State Financial Corporations Act, 1951 which deals with power to impose conditions for accommodation. Section 27 reads as follows:

> (1) In entering into any arrangement under section 25 with an industrial concern, the Financial Corporation may impose such conditions as it may think necessary or expedient for protecting the interests of the Financial Corporation and securing that the accommodation granted by it is put to the best use by the industrial concern.
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> (2) Where any arrangement entered into by the Financial Corporation with an industrial concern provides for the appointment by the Financial Corporation of one or more directors of such industrial concern, such provision and any appointment of directors made in pursuance thereof shall be valid and effective notwithstanding anything to the contrary contained in the Companies Act, 1956 (1 of 1956) or in any other law for the time being in force or in the memorandum, articles of association or any other instrument relating to the industrial concern, and any provision regarding share qualification, age limit, number of directorships, removal of office of directors and such like conditions contained in any such law or instrument aforesaid shall not apply to any director appointed by the Financial Corporation in pursuance of the arrangement as aforesaid.
>
> (3) Any director appointed in pursuance of sub-section (2) shall -
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> (a) hold office during the pleasure of the Financial Corporation and may be removed or substituted by any person by order in writing by the Financial Corporation;

(b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto;

(c) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement.

9. On behalf of the petitioners/accused in addition to invoking Section 27 of the State Financial Corporations Act, 1951, in case of A6/S.R. Singh, reliance is placed on ***Elizabeth Leela George V/s. Hmt International & Ors. (2007 ALL SCR 948)*** wherein on concession made it was held that the nominee Directors could not be prosecuted under Section 138 of the Act. It is also submitted that no process could be issued against A5/Carmel Prabhu and A6/S.R. Singh since there was no averment in the complaint or in the statement on oath of the Complainant to the effect that either of them were in charge of and responsible for the company at the time the offence was committed.

10. On the other hand, learned Counsel on behalf of the Complainant has submitted that the complaint has got to be read as a whole and when so read, learned Counsel submits that there were sufficient averments to show that both these accused namely A5/Carmel Prabhu and A6/S.R. Singh were the Directors who were in charge of and responsible for the conduct of the business of the accused no.1/company and, as such, process issued against them could not be faulted. Learned Counsel on behalf of the Complainant

has also drawn my attention to the second proviso to Section 141 of the Negotiable Instruments Act, 1881 which reads as follows;

> Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

The learned Counsel on behalf of the Complainant contends that this second proviso was inserted with effect from 6/02/2003 and therefore would be inapplicable to the facts of the case, the complaint having been filed on or about 24/07/1998. Counsel on behalf of the petitioners contends that the said proviso is brought about only to explain the prohibition contained in sub-section (3) of Section 27 of the State Financial Corporations Act, 1951.

11. Section 141 of the Act deals with offences by companies and Sub-section (1) thereof provides that if the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent

the commission of such offence:

12. In ***S.M.S. Pharmaceuticals Ltd. V/s Neeta Bhalla & Anr. (2005 (8) SCC 89)*** the Apex Court referred to ***K.P.G. Nair V/s Jindal Menthol India Ltd., (2001 (10) SCC 218)*** and stated that the allegations in the complaint did not in express words or with reference to the allegations contained therein make out a case that at the the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business and it was held that the requirement of Section 141 was not met and the complaint against the accused was quashed. The Apex Court stated that similar was the position in ***Katta Sujatha V/s Fertilizers & Chemicals Travancore Ltd. (2002 (7) SCC 655)*** which was the case of a partnership. It was found that there were no allegations contained in the complaint regarding the fact that the accused was a partner in charge of and was responsible to the firm for the conduct of the business of the firm nor was there any allegation that the offence was committed with the consent and connivance or that it was attributable to any neglect on the part of the accused. It was held that no case was made out against the accused who was a partner and the complaint was quashed. The Apex Court noted that the latest in the line is the judgment in ***Monaben Ketanbhai Shah V/s State of Gujarat (2004 (7) SCC 15)*** wherein it was observed that if the substance of the allegations made in the complaint fulfill the requirement of Section 141,

the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hypertechnical approach should not be adopted so as to quash the same. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the Court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the Complainant, the ingredients of the offence are altogether lacking. The Apex Court also noted that there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against the person sought to be made liable. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provisions. In ***K. Srikanth Singh V/s. M/s. North East Securities Ltd. & Anr. (2007 ALL SCR 2010)*** the Apex Court has stated that vicarious liability on the part of the person must be pleaded and proved. It cannot be inferred. Again in ***Sabitha Ramamurthy & Anr. V/s. R.B.S. Channabasavaradhya (2007 ALL SCR 190)*** the Apex Court stated that

vicarious liability of the Directors of the company can be inferred only if requisite statements, which are required to be averred in the complaint are made so as to make the accused vicariously liable. The Court also stated that in terms of Section 200 of the Code of Criminal Procedure, the Complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible therefor. If the Complainant fails in this respect, the accused would be entitled to file a suit for damages and the Court may also direct registration of a case against the Complainant for mala fide prosecution of the accused. In ***Saroj Kumar Poddar V/s State (NCT of Delhi) & Anr. (2007 ALL SCR 526)*** the Apex Court again stated that a complaint not making out as to how and in what manner the accused was responsible for the conduct of the business of the company, the complaint did not disclose any offence and the proceedings against him ought to have been quashed by High Court. In ***N.K. Wahi V/s Shekhar Singh & Ors. (2007 ALL MR (Cri.) 1445 (S.C.))***, the Apex Court has stated that a Director would be liable if at the time when offence is committed he was in charge and was responsible to the company for the conduct of the business of the company as well as the company. Merely being a Director of the company in the absence of above factors will not make him liable. There must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in charge and responsible

for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the Court can always come to a conclusion in facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.

13. Reverting to the facts of the case, the averments as regards the directors in relation to Section 141 of the Act are confusing and so also in the statement on oath of the Complainant. Admittedly, the offence gets committed in a case under Section 138 of the Act when there is failure to comply with the statutory notice after fifteen days from the receipt thereof. The Complainant in para 6 of the complaint stated that accused nos. 2 to 7 were in charge of and responsible for the payment of the amount of Rs. 22,75,000/-. The Complainant has not alleged that the said accused were in charge of or responsible to the company for the conduct of the business. The said two allegations do not mean one and the same thing. The Complainant again in para 7 stated that though the responsibility lies from accused no. 2 onwards who are Directors of the company, accused no.2 who is the Managing Director and accused no.3 are responsible as accused no.3 was a Director as well as the Manager at the local office of the accused no.1 at Goa which otherwise has its registered office in Bangalore. Again in para 21, the Complainant reiterated that all the accused persons were in charge of and

responsible for the conduct of the business of accused no.1 and as such the accused nos. 1 to 7 were guilty of having committed offences under Section 138 r/w Section 141 of the Act. In other words the Complainant did not allege that they were in charge of at the time the offence was committed which is a sine qua non for commission of offence. On behalf of the accused it is submitted that there is no question of reiteration that the accused were in charge of and responsible for the conduct of the business of accused no 1 since what was stated by the Complainant earlier was that accused nos. 2 to 7 were in charge of and responsible for payment of the amount of Rs. 22,75,000/-. Likewise in the statement on oath what was stated by the Complainant was that accused nos. 2 to 7 were in charge of and responsible for the payment for the loan amount. What Section 141 contemplates is that there should be a clear averment to the effect that when a person committing an offence under Section 138 is a company, every person who at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company so as to be proceeded against and punished accordingly. There is no categorical averment either in the complaint or in that matter in the statement on oath to the effect that accused nos. 2 to 7 and particularly, accused nos. 5 & 6 were in charge of and were responsible to the company for the conduct of the business of the company at the time the offence was committed and in this view of the matter, in my view no process could have been issued against the said accused nos. 5 and 6.

It may be noted that such a categorical averment was necessary to be made in the complaint. That apart A6/S.R. Singh who was admittedly a nominee Director of Karnataka State Financial Corporation enjoyed the immunity provided by clause (b) of Sub-section 3 of Section 27 of the State Financial Corporations Act, 1951 and therefore no process could have been issued against him. The second proviso to Section 141 of the Act was only clarificatory in nature and clarified what Section 27 of the State Financial Corporations Act, 1951 provided for. The complaint therefore cannot proceed against accused nos. 5 and 6. They deserved to be discharged.

14. The next question is whether the complaint could proceed against A1 which is a company and A2/Peter Prabhu who was its Managing Director. Learned Senior Counsel on behalf of accused no.2/Peter J.R. Prabhu has fairly conceded that accused no.2 being the Managing Director of accused no.1 would be liable for prosecution under Section 138. In this context reliance could be placed on ***Everest Advertising Pvt. Ltd. V/s State Govt. of NCT of Delhi & Ors. (2007 ALL MR (Cri.) 1741 (S.C.))*** wherein the Apex Court has stated that the Managing Director or a Dy. Managing Director, in view of ***S.M.S. Pharmaceuticals Ltd.*** (supra) would be deemed to be aware thereof (aware of commission of offence). Again, in ***Elizabeth L. George*** (supra) it was conceded that Managing Director and the Secretary could not escape liability.

15. However, the learned Senior Counsel contends that the subject cheques were issued on 2/05/1997 and they had to be presented within 6 months. Learned Senior Counsel further contends that the cheques were signed on behalf of the company by two of its authorized signatories namely A3/D'Souza and A4/Selva Kumar and therefore the date could not have been changed unilaterally by A3/D'souza alone. In other words, learned Senior Counsel on behalf of the accused contends that the cheque which was issued by two signatories on behalf of the company after its expiry could not have been validated only by one Director of the said company and had necessarily to be signed by two signatories. Learned Counsel further contends that the signature changing the date from 2/05/1997 to 29/12/1997 did not show that it was of the authorized signatory as it did not carry any stamp below it. Learned Senior Counsel further contends that it was the duty of the Complainant to have brought on record that A3/D'Souza was alone authorized to make the said alteration and in the absence of such prima facie evidence no process could have been issued against the accused.

16. The Complainant, in para 14 of the complaint, stated that the Complainant produced the cheques to accused no.3/D'Souza who was one of the signatories and the accused no.3 on behalf of the accused no.1 changed the date from 02/05/1997 to 29/12/1997 and signed the said cheques. The Complainant had stated in para 14 of the complaint that interpolation i.e. as

regards the change of date was an afterthought so much so that the accused no.3/D'Souza in his letter dated 15/06/1998 in reply to the legal notice dated 5/06/1998 had admitted having issued and signed the said cheques.

17. The learned Sessions Judge while dealing with this controversy stated that accused no. 3/D'Souza by letter dated 29/12/1997 had requested the Complainant to return the said cheques for revalidation of dates and accordingly, the accused no.3/D'Souza changed the dates from 2/05/1997 to 29/12/1997 and signed the said changes made and hence the said change was prima facie done by accused no.3/D'Souza on behalf of accused no.1. The learned Sessions Judge also noted, and in my view rightly, that whether two signatories are required for revalidation or only one was sufficient namely of accused no.3/D'Souza was a fact within the knowledge of accused no.3/D'Souza, or, it may be added here within the knowledge of accused no.1 company. Therefore, that would be a matter which would be required to be proved at the trial. Since the subject cheques were returned on behalf of the company with changed date duly signed by one of the Directors who was also one of the authorized signatories who had earlier signed the cheques, it could not be said at this stage that the cheques were no cheques at all in the eyes of law. Revalidation of cheques by change of dates is not unknown in commercial transactions. In the above view of the matter, the complaint will now have to proceed against accused no.1/company, accused no.2/Peter

Prabhu and against A4/SelvaKumar who has not challenged the order dated 3/11/1998 of the learned JMFC.

18. Consequently, the petition is partly allowed. The orders of both the Courts below are accordingly modified. The trial shall now proceed only against A1/Company, A2/Peter Prabhu, being the Managing Director and A4/Selva Kumar against whom the order dated 3/11/1998 has become final. Rule made absolute on above terms.

N.A. BRITTO, J.

NH/-